**Forrest City Machine Works, Inc. *and* Aaron Williams.** Case 26–CA–17735

September 24, 1998

DECISION AND ORDER REMANDING PROCEEDING TO ADMINISTRATIVE LAW JUDGE

BY MEMBERS FOX, LIEBMAN, AND BRAME

On June 30, 1997, Administrative Law Judge Robert C. Batson delivered a bench decision in this proceeding. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent also filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the bench decision and the record in light of the exceptions and briefs and has decided to remand this proceeding to the judge for further consideration as set forth below.

The judge found that the Respondent violated Section 8(a)(1) of the Act by discharging and/or refusing to rehire employees Aaron Williams and Robert Fields because they engaged in protected concerted activity, together with two other employees, Roy Burkes and Otis Dawson, by collectively demanding a wage increase. In its exceptions, the Respondent contends, inter alia, that Williams and Fields were not engaged in protected concerted activity when they asked for pay raises; that they were not discharged but voluntarily resigned from the Respondent's employ on October 4, 1996; that neither employee responded when asked if they had changed their minds about resigning; that Fields never attempted to rescind his resignation; that if any attempt was made by Williams to rescind his resignation it came after the Respondent had already hired employees to replace both Williams and Fields; and that the judge erred by excluding evidence of actions concerning Williams' and Fields' unemployment compensation claims taken by the Arkansas Employment Security Division and the Arkansas Board of Review Hearings.

1. The Respondent contends that Williams and Fields were not engaged in protected concerted activity because their requests for wage increases were "not for mutual aid and protection" in that "no employee in th[e] situation was acting on behalf or on the authority of his fellow workers," that "each employee was requesting a raise based on their individual merit and for themselves only" and that "each individual threatened separate action if he did not receive his raise." We find no merit in the Respondent's contentions.[1]

The record shows that in June 1966 employees Williams, Fields, Burkes, and Dawson had a meeting with General Manager Barbara Blackwood at which they collectively asked for a raise. At the June meeting, Blackwood told the four employees that she needed to discuss the issue with the owner of the Company and would "get back" with them. Blackwood failed to "get back" with the four employees. That prompted Williams, in October, to approach his foreman, Ray Neisler, and tell him that "me, Otis, Robert and Roy want[] to see [Operations Manager] Johnny [Watkins] about a raise." In response to this request, Neisler set up another meeting with the four employees and himself, Watkins, and Blackwood. At this meeting on October 4, with Williams "doing most of the talking for the four [employees]," they again asked for a raise. In response to their request, each employee was asked what he would do if he was not given a raise. The responses varied.

We find, in agreement with the judge, that in seeking raises in the manner described above, both Williams and Fields were engaged in protected concerted activity. Section 7 of the Act gives employees the right "to engage in . . . concerted activities for the purpose of . . . mutual aid or protection." It is well established that Section 7 grants employees the fundamental right to join together to present complaints about working conditions to management.[2] The conditions of employment which employees may seek to improve through concerted action include wages.[3] Here, with Williams acting as their primary spokesperson, the four employees twice met collectively with members of management to seek an increase in their wages. Respondent's contentions notwithstanding, the fact that each employee responded differently when asked what they would do if they did not receive raises does not negate the concerted nature of their wage complaint or remove their activity from the protections of the Act.[4]

2. The Respondent asserts that the judge erred by excluding Respondent's Exhibits 5, 6, and 7, which consist of documents filed with and actions taken by the Arkansas Employment Security Division and the Arkansas Board of Review Hearing concerning unemployment compensation claims made by Williams and Fields, re-

[1] Member Brame would remand the issues of whether the employees' actions were concerted and were for the "mutual aid and protection" of employees to the judge along with the other issues to be remanded. In considering these issues, he would instruct the judge to make findings concerning, inter alia, (1) whether Williams told Operations Manager Watkins before the October 4, 1996 meeting that "everybody had to take care of himself"; and (2) whether General Manager Blackwood initially planned to speak to the employees individually on October 4 but family problems necessitated her speaking to the employees in a group setting.

[2] *NLRB v. Washington Aluminum Co.,* 370 U.S. 9, 17 (1962).

[3] See *Jeannette Corp. v. NLRB,* 532 F.2d 916, 918, 919 (3d Cir. 1976).

[4] See *Kysor Industrial Corp.,* 309 NLRB 237, 238 (1992) (Approximately 15 employees collectively approached their foreman for clarification of conflicting work assignments. After being ordered back to work, all immediately resumed work except for six employees who wanted specific directions. Those who immediately returned to work were not disciplined, but the six who remained were given reprimands. The Board found that all 15 employees were engaged in "the protected concerted activity of making a group inquiry as to their specific work assignments.")

spectively. Specifically, the Respondent contends that the evidence would show that Williams was denied unemployment because (1) he "initiated the separation" of employment and (2) he told the Employment Security Division that he had quit his employment with the Respondent. The Respondent also contends that the excluded evidence concerning Fields would show that he was denied unemployment benefits because he voluntarily resigned his position with the Respondent.

We agree with the Respondent that the judge should have admitted the evidence. Although such evidence is not controlling, it is admissible for whatever probative value it has.[5] Accordingly, the record shall be reopened to admit Respondent's Exhibits 5, 6, and 7 and the judge shall give these exhibits whatever weight the evidence warrants.[6]

3. The Respondent also contends that Williams and Fields had resigned and were not discharged; that they failed to respond at the end of the October 4 meeting when Blackwood asked if anyone had changed their minds about resigning; that Fields never attempted to rescind his resignation; that if any attempt was made by Williams to rescind his resignation it came after the Respondent had already hired two new employees to fill both Williams and Fields' positions; and that the two employees hired after the October 4 meeting were replacements for Williams and Fields rather than part of a normal seasonal buildup.

Upon reviewing the Respondent's exceptions and briefs and the General Counsel's brief in response to the Respondent's exceptions, we find it clear that the judge failed to make adequate credibility resolutions concerning certain testimony relating to these issues and that such resolutions are necessary for a proper evaluation of the case. Accordingly, we shall remand the case to the judge for the purpose of making explicit credibility resolutions and findings concerning (1) exactly what Williams and Fields said at the October 4 meeting about what action they would take if their raises were denied; (2) whether, at the close of the October 4 meeting, Blackwood asked if any of the employees had changed their minds about what action they would take if they were denied a raise; (3) whether, if Williams resigned, he attempted to rescind his resignation about 30 minutes after the October 4 meeting; (4) whether, if Williams resigned and did not attempt to immediately rescind his resignation, he later attempted to rescind the resignation before he was replaced; (5) whether, if Williams and Fields resigned, and Williams at some point in time did attempt to rescind his resignation, that rescission included Fields; (6) whether the two new hires were replacements for Williams and Fields rather than part of a normal seasonal buildup of employees and (7) whether the Respondent was able to hire additional employees beyond the two employees it hired, but did not do so. We shall further remand the case so that the judge may reopen the record for the sole purpose of accepting into evidence and considering to the extent deemed appropriate by the judge Respondent's Exhibits 5, 6, and 7.

[5] *Armored Transportation of Nevada, Inc.,* 265 NLRB 1648, 1653 (1982*); Magic Pan, Inc.,* 242 NLRB 840, 841 (1979).

[6] Id.

## ORDER

IT IS ORDERED that this proceeding is remanded to Administrative Law Judge Robert C. Batson for the purposes described above.[7]

IT IS FURTHER ORDERED that the judge shall prepare and serve on the parties a Supplemental Decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended Order, as appropriate on remand. Copies of the Supplemental Decision shall be served on all parties, after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

*Tamra Sikkink, Esq.,* for the General Counsel.
*J. Bruce Cross, Esq.* and *Rick Roderick, Esq*., of Little Rock, Arkansas, for the Respondent.

## BENCH DECISION

ROBERT C. BATSON, Administrative Law Judge. This case was heard by me on May 19 and 20, 1997, at Memphis, Tennessee. At the close of the hearing, I delivered a Bench Decision, pursuant to Section 102.35(a)(10) of the Board's Rules and Regulations, which found that Respondent had engaged in certain unfair labor practices and ordered appropriate remedial action designed to effectuate the policies of the Act.

In accordance with the provisions of Section 102.45 of the Board's Rules and Regulations, I certify the accuracy, as corrected, on pages 250 through 256 of the transcript which pages contain the decision, and I hereby file with the Board a certified copy of those pages which are attached hereto as Appendix A.

This recitation of the Bench Decision is hereby supplemented by the formal order and Notice to Employees.

Upon the findings of fact and conclusions of law set forth in the Bench Decision, I issue the following recommended[1]

## ORDER

The Respondent, Forrest City Machine Works, Inc., Forest City, Arkansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

[7] In remanding this case, we are not passing on any of the other issues raised by the parties' exceptions or briefs at this time.

Because the Board has been advised that Judge Batson has retired from the Agency, the Board requests that the chief administrative law judge ascertain the availability of Judge Batson. In the event that Judge Batson is not available, the case is remanded to the chief administrative law judge who may designate another administrative law judge in accordance with Sec. 102.36 of the Board's Rules.

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Discharging or otherwise discriminating against its employees because they engage in protected activity for mutual aid and protection with respect to wages, hours, and other terms and conditions of employment.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Make Aaron Williams and Robert Fields whole for any loss of pay or benefits they may have suffered by reason of the discrimination against them described in this Bench Decision.

(b) Within 14 days from the date of this Order, offer Aaron Williams and Robert Fields reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed.

(c) Expunge from the personnel files of Aaron Williams and Robert Fields any references to their unlawful discharges and within 3 days notify them that it has done so and that such shall not be used against them in any way.

(d) Within 14 days after service by the Region, post at its facility in Forrest City, Arkansas, copies of the attached notice marked "Appendix B."[2] Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since November 4, 1996.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

APPENDIX A

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. . . .

JUDGE BATSON: Thank you, Mr. Cross. Counselors, there are certainly some close questions here, particularly credibility resolutions and—and—on the facts, the sequence of events and so on, however I suspect if I let you file briefs and so on, that my decision would be the same and however I rule, it's going to be —it's going to the Board anyway so I'll render a bench decision pursuant to 102.35 (a) (10) of the—of the Act.

This case originated with the filing of a charge on November Fourth by Aaron Williams, an individual and employee under Section 2(3) of the Act of Forrest City Machine Works, Inc. Pursuant to that charge on January Thirty-one, Nineteen Ninety-seven, pursuant to USC—29 USC et. seq, Section 151, the National Labor Relations Act, herein

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the Act, the Regional Director for Region Twenty-six issued a complaint and notice of hearing wherein he alleged as far as for practical purposes or material purposes here that four employees, Aaron Williams, Robert Fields, Otis Dawson and Roy Burkes engaged in protected concerted activity on October Four, Nineteen Ninety-six at which time they sought together a raise from the Employer and that thereafter, on October Fourteen, Nineteen Ninety-six Respondent terminated employees Aaron Williams and Robert Fields. This is alleged to violate Section 8(a)(1) of the Act. Since the General Counsel's theory is that it was because they engaged in the protected concerted activity of seeking a raise that—that they were terminated. The Respondent contends that they were not terminated, they quit and there is some evidence to that effect.

There is no issue that the Complaint alleges the answer admits that the Employer is engaged in business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Now, getting to the alleged protected concerted activity, there is no dispute that during the summer of Nineteen Ninety-six these same four employees sought through Mr. Watkins, I believe it was, to ask for a raise. They—and I believe the testimony is that Mr. Watkins contacted Ms. Blackwood—

MR. HOOKS: Pardon me. I hate to interrupt but—

JUDGE BATSON: Yes?

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MR. HOOKS:—but you said "Mr. Watkins" and it should be "Mr. Williams."

JUDGE BATSON: I'm sorry.

MR. HOOKS: And—and you said "Nineteen Eighty-six" and it should be—

JUDGE BATSON: Nineteen Ninety-six, thank you.

MR. HOOKS: I'm sorry, Your Honor.

JUDGE BATSON: Thank you. No, that's fine, but at any rate, a couple of months later they had still not heard anything and on—apparently on October Third Mr. Williams, I believe it was, went to Mr. Neisler and asked if he could get Mr. Watkins to arrange a meeting and Mr. Neisler did that. The meeting occurred on October Fourth at approximately two o'clock, as I recall. Present at that meeting was Mr. Watkins, Mr. Neisler, the four individuals, Mr. Williams, Fields, Dawson and Burkes, and Ms. Blackwood by speaker—by telephone speaker. The—my notes indicate that during that—during that meeting Mr. Watkins explained—Mr. Watkins, yes—explained to Ms. Blackwood that the employees were there, they wanted a—they were seeking a raise and Ms. Blackwood went into details as to why it could not be granted.

Now, at some point, I recall, Mr. Watkins did ask each of the individuals what—what they would do if they did not get their raise. Mr. Williams testified that he stated if he

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didn't get the raise, he could walk, or at least that's what my notes reflect. Mr. Fields said he would do what the majority did, Mr. Dawson indicated that he would slow down and Mr. Burkes said that he would continue to work because he was nearing retirement anyway. Well, Counsel, this is protected concerted activity. Now, there is other testimony that—that Mr. Williams stated, instead of "I can walk," that he stated he

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

would quit, there's also testimony that Mr. Fields stated that he would follow Aaron or Mr. Williams other than do what the majority did and as Mr. Cross pointed out on cross-examination, there was no majority who said they would do the same thing.

Now, on October Fourteenth the employees, Mr. Williams and Mr. Fields, were given letters stating that their resignation had been accepted and neither of them said, "But we didn't resign," however on the—they continued to work then until the Eighteenth and I believe the testimony is that it was not until the Seventeenth that Mr. Williams approached either Mr. Neisler or Mr. Watkins and told him that he did not intend to quit, he didn't want to quit and presumably they got in touch with Ms. Blackwood who said it was too late, at lease that's what Mr. Neisler told—told the employees. Now, Mr. Neisler also testified that the Employer did not have a policy that it would not rehire people who quit. The Respondent says that they had hired two employees in the machine shop to

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replace—a gentleman named Cox and one named Layman to replace Mr. Williams and Mr. Fields, however these two employees did not have experience on the machine that was operated by Mr. Williams, anyway, and the General Counsel argues that this is part of the buildup that was coming in the fall, the testimony was that there were only nine employees employed at that time and during the peak season there would be twenty-five to thirty and the Employer was beginning to increase his work force at—at that period in time.

It's evident that Mr. Williams certainly attempted, if, at any point he did say "I quit" or "I will quit in two weeks," it's clear that he attempted to rescind that and the evidence is that Mr. Fields was doing whatever Mr. Williams did. Accordingly, the Respondent said "It's too late, they've been replaced." As I said, the General Counsel contends that these were—could have been replacements for these gentlemen but it could also be a buildup of the labor force for their peak season.

Now, Counselors, I find that these employees were engaged in protected concerted activity, that the Respondent refused to permit Williams and Fields to rescind their resignation, if, indeed, they had tendered a resignation because they had engaged in this concerted activity. Mr. Williams was obviously the leader of the group and therefore the—and had

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also made the issue during the summer of Nineteen Ninety-six so that was twice in two or three months that Mr. Williams had led a group seeking more money, the Employer might well have—considered that to be an act that could incite other employees to seek raises also.

I find that the employees were engaged in protected concerted activity and that the Respondent refused to permit Williams and Fields to rescind their resignation, if they had resigned, or he—they terminated them on or about October—what was it? About the Nineteenth, I think, before—on their last day of work. Accordingly, I shall order the Respondent to offer Williams and Fields reinstatement and to make them whole for any loss of pay or other benefits they may have suffered by reason of this discrimination against them. In accordance with *F.W. Woolworth Co.,* 90 NLRB 289, 1950, with interest computed thereon as set forth in *New Horizons For The Retarded,* 283 NLRB, 1173, 1987 and to post the appropriate notice which I will attach to—to my certification of the record and this decision.

Thank you very much and are there any questions now? That concludes the decision.

Mr. Cross?

MR. CROSS: (Indicated negatively).

JUDGE BATSON: Ms. Sikkink?

MS. SIKKINK: No, Your Honor.

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MR. CROSS: How long will we have to file exceptions from the date of the decision?

JUDGE BATSON: I think you have, what is it? Twenty days?

MR. HOOKS: Twenty-eight days. Your Honor.

JUDGE BATSON: Mr. Hooks is Regional Attorney so he knows, I don't know. I know how long but it just alluded me.

All right, Counselors, I want to compliment all of you on your professionalism and the manner in which you tried your case and if there is nothing further, the hearing is now closed.

(Whereupon, the hearing was closed at 2:40 p.m.)

## APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against our employees because they engaged in concerted activity for their mutual aid and protection with respect to wages, hours, and other terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make Aaron Williams and Robert Fields whole for any loss of earnings and other benefits they may have suffered by reason of our discrimination against them.

WE WILL, within 14 days from the date of the Board's Order, offer Aaron Williams and Robert Fields full reinstatement to their former jobs or, if those jobs no longer exist, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL, within 14 days from the date of the Board's Order, remove from the personnel files of Aaron Williams and Robert Fields any reference to their unlawfuldischarges, and WE WILL, within 3 days thereafter, notify them in writing that we have done so and that we will not use the discharges against them in any way.

FORREST CITY MACHINE WORKS, INC.